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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
)

Implementation of Section 25)
of the Cable Television Consumer)
Protection and Competition Act of 1992)
)

Direct Broadcast Satellite)
Public Service Obligations)
)
)
)

MM Docket No. 93-25

COMMENTS OF DirecTv, INC.

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EXECUTIVE SUMMARY

DirecTv and Hughes Communications Galaxy, Inc. ("HCG") are sister subsidiaries of Hughes Communications, Inc. ("HCI"). HCG is a Commission licensee in both the fixed satellite service and the direct broadcast satellite ("DBS") service. DirecTv is the DBS operating, customer service and programming acquisition arm of the HCI family. Following the launch of the first DBS satellite in December 1993, DirecTv will initiate the first true DBS service in the United States in early 1994. Specifically, DirecTv will offer -- via satellites operating in the DBS band at 12/17 GHz -- a nationwide, multichannel video programming service to those households across the country equipped with low-cost home dishes approximately eighteen inches in diameter.

The present rulemaking involves the Commission's implementation of Section 25 of the Cable Act, which adds a new section 335 to the Communications Act of 1934, and imposes certain public interest and program carriage obligations on DBS providers. The Commission has long acknowledged the potential of DBS to provide a wide spectrum of uses to the public apart from the provision of entertainment programming. Maximizing this potential is the essence of the present proceeding, and indeed, represents a core public service goal to which DirecTv is enthusiastically and seriously committed. DirecTv seeks not only to ensure that quality noncommercial educational or informational programming is made available to consumers in the most efficient and economical manner possible, but also that such programming is actively promoted and packaged in a fashion that will increase its appeal and distribution to the widest possible spectrum of DirecTv's viewership.

DirecTv's comments generally track the organization of the Commission's Notice of Proposed Rulemaking. As an overarching general principle, DirecTv strongly urges the Commission to afford DBS providers the maximum possible flexibility and discretion with respect to the fulfillment of their public service obligations. In this regard, the Commission should adopt a regulatory model which maximizes provider flexibility as its starting point for fashioning rules regarding DBS public interest and carriage obligations. Such an approach is consistent with congressional intent as expressed in the plain language of Section 25, and is the best way for the Commission to ensure that DBS as a new service with vast potential is not hindered by excessive regulation. Particularly in these early stages of the DBS rollout, when DBS providers are struggling as MVPDs to compete with the cable television juggernaut, the Commission should be extremely wary of constraining unduly the types of programming that DBS licensees can obtain to satisfy their statutory obligations.

With respect to the public interest requirements imposed by Section 25(a) of the Cable Act, DirecTv urges the Commission at this juncture to impose only the minimum obligations set forth in Section 25, *i.e.*, the reasonable access requirement of Section 312(a)(7) and the equal opportunity requirements of Section 315. In so doing, the Commission should tailor these broadcast rules to the DBS context. Although DBS providers should be accorded latitude at least equivalent to that of broadcasters in meeting these public interest requirements (including the discretion to meet the obligation through the creation of dedicated political channels), the Commission must also account for the inherently nationwide aspects of DBS in structuring its rules.

The Section 25(b) requirement for carriage of noncommercial educational or informational programming should likewise be designed to allow for flexibility and creativity in the arrangements between programmers and DBS providers. Although DBS providers must meet the general obligation imposed by Section 25(b), including providing 47% of

DirecTv also strongly urges the Commission to bring the 4% carriage obligation into effect nine months from the date of commencement of a DBS provider's service. DirecTv and other DBS providers will need at least this amount of time to identify sufficient programming, enter into any necessary agreements for its carriage, and to determine the optimal manner in which such programming can be integrated into its DBS service offering.

In deciding upon the scope and types of programming that DBS providers may use in satisfying their public service obligations, the Commission should expansively interpret the central provision that imposes upon DBS providers the obligation to carry noncommercial programming. Specifically, Section 25(b)(1) mandates that DBS providers reserve 4-7% of their total channel capacity for "noncommercial programming of an educational or informational nature." On its face, this language plainly contemplates that DBS providers should be permitted to choose from a wide array of qualified programming.

Correspondingly, the Commission should not read Section 25(b)(3), which specifies that DBS providers shall meet their statutory requirements by making channel capacity available to "national educational programming suppliers," to mean that such suppliers are the exclusive pool from which DBS providers may draw programming to satisfy their public service obligations. Such an interpretation would render Section 25(b)(1)'s language meaningless. DirecTv is committed to offering programming by "national education programming suppliers." But while Section 25(b)(3) guarantees such suppliers access to some reasonable portion of DirecTv's channel capacity on nondiscriminatory terms and conditions, the provision should not be read to allow any class of noncommercial programming suppliers to consume all of DirecTv's reserved capacity. Such an interpretation would severely limit the amount and variety of noncommercial educational or informational programming available for distribution to the viewing public.

Similarly, Section 25(b)(4) by its terms is applicable only to that channel capacity that DBS providers are obligated to make available on a nondiscriminatory basis to "national educational programming suppliers." In determining the appropriate rates to be charged to national educational programming suppliers, DBS providers should be able to incorporate the primary costs of launching and distributing their DBS services. DirecTv, however, strongly agrees with the Commission's view that the assumption underlying Section 25(b) with respect to reasonable rates and costs presents an incomplete picture of how DBS providers in general and how DirecTv in particular are likely to satisfy their public interest obligations. Section 25(b)(4) applies only to that limited situation under the statutory scheme where national educational programming suppliers lease reserved capacity from DBS providers. But as DirecTv points out (and as the Commission has recognized) such an arrangement may not be the only way such channels are provided. DBS providers, for example, may choose to pay a program suppliers for the use of their programming or may undertake various promotional activities in exchange for other consideration. This is in fact how DirecTv primarily intends to meet the public service obligations set forth in Section 25, i.e., by selecting varied and interesting noncommercial or informational programming and providing it as an integrated part of the DirecTv service. All parties subject to or affected by the Section 25 of the statute will be best served by arrangements in which DBS providers are

actively involved and have a significant interest in ensuring the highest possible viewing audience in conjunction with the integration of public service programming into their service packages.

By taking a flexible regulatory approach to DBS, the Commission will and should allow DBS licensees to pursue innovative programming arrangements and creative packaging of noncommercial programming, and to integrate such programming into their service offerings. The Commission need not and should not relegate noncommercial DBS educational or informational programming to a de facto "graveyard" of unwatched PEG access-type channels. Instead, DBS providers should be given the opportunity and incentive to embrace the Commission's public interest requirements, and to acquire and market the required programming in a manner that maximizes program quality, program diversity and customer interest.

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COMMENTS OF DirecTv, INC.

DirecTv, Inc. ("DirecTv") hereby responds to the Commission's Notice of Proposed Rule Making in the above-captioned proceeding, FCC 93-25, released March 2, 1993, (the "Notice"), concerning implementation of the provisions of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992) (the "1992 Cable Act") with respect to certain public service obligations of Direct Broadcast Satellite ("DBS") service providers (Section 25).

I. INTRODUCTION

A. DirecTv's Interest In This Proceeding

DirecTv and Hughes Communications Galaxy, Inc. ("HCG") are sister subsidiaries of Hughes Communications, Inc. ("HCI"). HCG is a Commission licensee in both the fixed satellite service and the direct broadcast satellite ("DBS") service. DirecTv is the DBS operating, customer service and programming acquisition arm of the HCI family.

Following the launch of the first DBS satellite in December 1993, DirecTv will initiate the first true DBS service in the United States in early 1994. Specifically, DirecTv will offer--via satellites operating in the DBS band at 12/17 GHz -- a multichannel video programming

service to those households across the nation equipped with low-cost home dishes approximately eighteen inches in diameter.^{1/} With its full complement of satellites in orbit, DirecTv will provide approximately one hundred and fifty channels of quality subscription and pay-per-view video programming -- featuring entertainment, educational or informational programming -- directly to United States consumers on a nationwide basis. As confirmation of its commitment to the provision of quality programming, in addition to previously announced agreements with Paramount Pictures and Columbia/Tri-Star Pictures (to provide pay-per-view movies) and the Disney Channel, DirecTv recently announced the signing of agreements to distribute five programming services owned by Turner Broadcasting System (CNN, Headline News, The Cartoon Network, Superstation TBS and, where available, TNT), as well as agreements to distribute the USA Network, The Sci-Fi Channel, TNN: The Nashville Network, CMT: Country Music Television and the Family Channel.

The Commission has long acknowledged the potential of DBS to provide a wide spectrum of uses to the public apart from the provision of entertainment programming. Maximizing this potential is the essence of the present proceeding, and indeed, represents a core public service goal to which DirecTv is enthusiastically and seriously committed. In this regard, DirecTv seeks not only to ensure that quality noncommercial educational or informational programming is made available to consumers in the most efficient and economical manner possible, but also that such programming is actively promoted and packaged in a fashion that will increase its appeal and distribution to the widest possible spectrum of DirecTv's viewership.

^{1/} Thus, under the nomenclature of the Cable Act, DirecTv will enter the video market as a multichannel video programming distributor ("MVPD") using an alternative to cable technology and other locally-based video programming delivery systems. The Commission recently defined "multichannel video programming distributor" as an entity "engaged in the business of making available for purchase, by subscribers or customers, multiple channels of video programming." Implementation of Sections 12 and 19 of the Cable Television Consumer Protection Act of 1992, First Report and Order, MM Docket No. 92-265, FCC 93-178 (released April 30, 1993), at 3-4 n.3. The Commission found that such entities include, but are not limited to, cable operators, multichannel multipoint distribution service ("MMDS") providers, DBS providers, a television receive-only satellite program distributor ("TVRO"), and a satellite master antenna television system ("SMATV") operator, as well as buying groups or agents of such entities. Id.

B. Overview: Regulatory Flexibility

Section 25 of the Cable Act adds a new section 335 to the Communications Act, imposing certain video programming obligations on DBS providers. Specifically, Section 25(a) requires the Commission to initiate a rulemaking to impose "public interest or other requirements for providing video programming" on providers of DBS service. This general mandate leaves the decision of what programming obligations should be placed on DBS providers to the Commission's discretion, except that at a minimum the Commission must tailor certain broadcast political programming requirements to DBS providers. The imposition of other public service obligations, including the concept of "localism," is also left to the Commission's discretion.

Section 25(b) imposes certain specific obligations on DBS providers, and requires the Commission to implement rules governing the reservation and availability of channels for noncommercial educational or informational programming at reasonable rates. DirecTv's comments below generally track the organization of the Notice. As an overarching general principle, however, DirecTv strongly urges the Commission to afford DBS providers the maximum possible flexibility and discretion with respect to the fulfillment of public interest obligations.

In terms of regulatory classification, DBS is not, of course, a broadcast service, and DirecTv's comments should not be construed to suggest otherwise.^{2/} Indeed, the Notice notes the care that the Commission has taken **not** to bind or constrict the development of this fledgling service by tying it prematurely to any particular regulatory classification, or to create new ones, until more is known about how DBS service will develop in the marketplace.^{3/} Nevertheless, as set forth below,

^{2/} DirecTv will offer a subscription DBS service, which the Commission and the courts have held does not constitute "broadcasting" within the meaning of the Communications Act. See Notice at 2 n.8; Subscription Video, 2 FCC Rcd 1001 (1987), aff'd sub nom. National Association for Better Broadcasting v. FCC, 849 F.2d 665 (D.C. Cir. 1988).

^{3/} Notice at ¶ 7; see DBS Order, 90 F.C.C. 2d at 708-710. In fact, in its decision to quantify a 4-7% percentage of total channel capacity to define minimum carriage obligations for noncommercial educational or informational programming, Congress has imposed much stricter obligations on DBS providers than it has historically required of broadcasters. Cf., e.g., Children's Television

except where it is otherwise constrained by the express language of the statute, the Commission should use a model which maximizes licensee flexibility as its starting point for fashioning rules regarding DBS public interest and carriage obligations. Broadcast licensees, for example, traditionally have enjoyed much discretion in satisfying their public interest obligations, and "with only the rarest of exceptions," a broadcast licensee's selection of programming is a matter that should be decided by station licensees and by the audience through its viewing pattern voting."^{4/}

A similarly flexible regulatory approach makes eminent sense in the context of imposing DBS public interest obligations. First, such an approach is consistent with congressional intent as expressed in the plain language of Section 25. With respect to Section 25(a)'s public interest requirements, for example, Congress has specified that the Commission is to modify the broadcast political programming requirements of Communications Act Sections 312(a)(7) and 315 as the minimum content of such regulations.

More important, permitting maximum flexibility is the best way for the Commission to ensure that DBS as a new service with vast potential is not hindered by excessive regulation. Particularly in these early stages of the DBS rollout, when DBS providers are struggling as MVPDs to compete with the cable television juggernaut, the Commission should be extremely wary of constraining unduly the types of programming that DBS licensees can obtain to satisfy their statutory obligations. The Commission's rules should not stifle the innovative use of DBS technology by

Programming and Advertising Practices, Report and Order, 96 F.C.C.2d 634, 651-52 (1983) (noting that "program quota systems have been viewed as fundamentally in conflict with the statutory scheme of broadcast regulation. . . . [The Commission has not] found it either desirable from a policy perspective or acceptable from a legal perspective to define by hours, schedule, and type any particular programming that should be broadcast to fulfill the public interest obligations of licensees"); Report on Editorializing by Broadcast Licensees, 13 F.C.C. 1246, 1247 (1949) (stating that "it is the licensee . . . who must determine what percentage of the limited broadcast day should be appropriately devoted to news and discussion or consideration of public issues, rather than to the other legitimate services of radio broadcasting").

^{4/} Children's Television Programming and Advertising Practices, Report and Order, 96 F.C.C.2d at 651.

programmers and licensees. Thus, DirecTV agrees with the Commission that apart from the statutorily imposed political programming rules and carriage obligations, "given the flexible regulatory approach taken for DBS and its early stage of development," no other public interest requirements, including localism, should be imposed upon DBS providers at this time.^{5/}

The Section 25(b) requirement for carriage of noncommercial educational or informational programming should likewise be designed to allow for flexibility and creativity in the arrangements between programmers and DBS providers. Although DBS providers must meet the special obligations imposed by Section 25(b), including providing of 4-7% of their total channel capacity for noncommercial educational or informational video programming, and not exercising any editorial control over such programming, DBS licensees should otherwise be entrusted with the discretion to determine the "mix" of public service programming that will best serve the Act's statutory requirements.

In this regard, the Commission should expansively interpret the central provision that imposes upon DBS providers the obligation to carry noncommercial programming. Specifically, Section 25(b)(1) mandates that DBS providers reserve 4-7% of their total channel capacity for "noncommercial programming of an educational or informational nature." The Notice does not accurately quote this statutory language, requesting comment instead on the definition of the term "noncommercial educational and informational programming."^{6/} DirecTV believes the difference may be significant, and urges the Commission to recognize that the plain language of Section 25(b)(1) authorizes DBS providers, in satisfying their public interest obligations, to choose from a wide array of qualified educational or informational programming.

^{5/} See Notice at ¶ 29.

^{6/} See Notice at ¶ 44.

Correspondingly, the Commission should not read Section 25(b)(3), which specifies that DBS providers shall meet their statutory requirements by making channel capacity available to "national educational programming suppliers," to mean that such suppliers are the exclusive pool from which DBS providers may draw programming to satisfy their public service obligations. Such an interpretation would render Section 25(b)(1)'s language meaningless. DirecTv is committed to offering programming by "national education programming suppliers." But while Section 25(b)(3) guarantees such suppliers access to some reasonable portion of DirecTv's channel capacity on nondiscriminatory terms and conditions, the provision should not be read to allow any class of noncommercial programming suppliers to consume all of DirecTv's reserved capacity. Such an interpretation would severely limit the amount and variety of noncommercial educational or informational programming available for distribution to the viewing public.

A flexible regulatory approach, in addition to being consistent with the plain language of the Act, will provide enormous benefits to DBS service providers and the public. DBS licensees will be freer to pursue innovative programming arrangements and creative packaging of noncommercial programming, and much more capable of integrating such programming into their service offerings. Put another way, the Commission need not and should not relegate noncommercial DBS educational or informational programming to a de facto "graveyard" of unwatched PEG access-type channels. Instead, DBS licensees can and should be given the opportunity and incentive to embrace the Commission's public interest requirements, and to acquire and market the required programming in a manner that maximizes program quality, program diversity and customer interest.

As the Commission considers more specific comments offered below, DirecTv requests that the FCC keep such regulatory flexibility in mind in structuring the public interest and concomitant program carriage obligations of DBS providers.

II. DEFINITION OF PROVIDER OF DBS SERVICE

A. C Band Operations

DirecTv agrees with the Commission's reading of the Act to exclude C band operations from the obligations imposed by Section 25. The plain language of subsection 25(b)(5) is expressly limited to entities operating in the Ku band pursuant to Parts 25 or 100 of the Commission's rules, and the Commission should adopt this interpretation.

B. Part 100 Licensees

The Commission has tentatively concluded that Part 100 licensees should be held ultimately responsible for ensuring that public interest obligations imposed pursuant to Section 25 are met. As the FCC has acknowledged, the fact that DBS licensees may delegate day-to-day control of implementing public interest requirements to the entity actually controlling the distribution of programming by satellite to home viewers complicates the imposition of public interest responsibilities on DBS licensees, particularly those who do not exert control over the distribution of programming.^{7/} In view of the uncertain nature and potential variety of DBS program distribution arrangements, however, the Commission's most logical course (and the easiest one to administer) is to follow the plain language of Section 25((b)(5)(A) -- which applies expressly in unlimited terms to Part 100 "licensees" in the Ku band -- and to allocate the public interest responsibility to the Part 100 licensees.

DirecTv requests, however, that the Commission remain cognizant of the "complex interrelationships" and layers of entities that can be involved in the actual delivery of programming supplied to the home by DBS systems.^{8/} The Commission has quite correctly identified a number of

^{7/} Notice at ¶¶ 6-8; see also House Report at 124 ("The Committee does not intend that the licensed operator of the DBS satellite itself be subject to the requirements of this subsection unless it seeks to provide video programming directly.").

^{8/} Notice at ¶ 6.

potential distribution arrangements, many of which will involve DBS licensees shifting contractually some or all of the day-to-day responsibility for meeting Section 25's requirements. In presenting its own mix of specialized subscription and pay-per-view services, for example, DirecTv has entered and will enter into such complex arrangements. The Commission should ensure that its new rules allow for and do not restrict such contractual freedom so that DBS providers may decide how they can best incorporate Section 25's public interest requirements into their businesses.

C. Entities Under Part 25

The second definition of DBS provider under Section 25 includes "any distributor who controls a minimum number of channels (as specified by Commission regulation) using a Ku-band fixed service satellite system for the provision of video programming directly to the home and licensed under Part 25." DirecTv shares the Commission's view that the term "distributor" here includes parties engaged in activities such as program packaging, program delivery, subscription billing and customer service. DirecTv also agrees that the term "control" of channels encompasses control that is acquired through sale, lease, or other arrangement that gives the distributor the right to select and transmit its programming and to limit access to that programming.

In this regard, DirecTv also agrees with the Commission's conclusion that PRIMESTAR -- which operates a direct-to-home service using Ku band fixed service satellite ("FSS") leased capacity on a GE satellite -- is unambiguously included within the statutory definition of DBS provider for purposes of Section 25 of the Cable Act. PRIMESTAR is therefore subject to the full panoply of public interest obligations that attach under the statute, in the same manner as its future competitors licensed under Part 100, including HCG/DirecTv.

1. Quantification of "Channels"

In addressing the definition of "provider of DBS service," the Commission has requested comment on the minimum number of channels that would trigger a Part 25 Ku band DBS provider's public interest obligations. As the Commission recognizes, this in turn requires a determination of how a single "channel" should be measured or defined, which is a larger question affecting all DBS providers.^{9/} The Commission states that it is initially inclined to define channel in terms of the bandwidth occupied by a transponder in the respective frequency band which the satellite occupies -- 24 MHz for Part 100 licensees and 36 MHz for Part 25 DBS providers.^{10/}

The Commission may choose to adopt a bandwidth approach for the narrow purpose of defining for purposes of Section 25(b)(5)(A)(ii) a minimum number of channels that will trigger a Part 25 distributor's coverage under the statute as a DBS provider, in those instances where such distributors do not offer their services using digital compression. For this narrow purpose, such a minimum must at the very least encompass the number of transponders leased by PRIMESTAR (eleven), since PRIMESTAR is currently the only known entity that operates a viable DBS service in the Part 25 frequency bands. Whatever the analog minimum should be for other Part 25 distributors, PRIMESTAR clearly possesses the kind of capacity for the provision of DBS services that requires being defined as a "provider of direct broadcast service" under the statute.^{11/}

The problem with using the Commission's proposed bandwidth approach for other purposes under the statute -- i.e. measuring total "channel capacity" for purposes of imposing Section

^{9/} Notice at ¶¶ 12-13.

^{10/} Id. at ¶ 13.

^{11/} Even in instances where Part 25 distributors do begin offering DBS service using compression technology, eleven "channels" (or, to use the terminology DirecTV proposes below, eleven "CEs") should still be an acceptable minimum to trigger coverage under the statute, since DBS end users will not be able to distinguish whether or not the "channels" offered have been compressed.

25(b)(1)'s carriage obligation -- is that the Commission cannot reasonably measure a number of channels (or, as discussed further infra, total channel capacity) using a bandwidth criterion for those DBS providers who use digital compression technology to deliver video signals. The use of compression technology will greatly increase the number of channels available on DBS systems, and will certainly be used by the majority of DBS systems.^{12/} Indeed, the Commission itself has observed that "a Part 100 DBS system with 10 allotted channels of specified spectrum width (6 MHz for each channel) could conceivably deliver up to 40 channels of video service," and "[t]hese numbers are expected to increase over time."^{13/} Importantly, Congress appears to have expressly contemplated that the Commission would consider, in determining a DBS system's channel capacity, "the availability of or the use by a DBS operator of compression technologies."^{14/}

Therefore, in order to determine more accurately the number of "channels" for purposes of assessing a DBS provider's public interest obligations, DirecTv proposes (as explained in more detail infra) that the Commission in appropriate instances account for the presence of compression by assuming a 4:1 compression ratio relative to the number of satellite transponders on the provider's system.^{15/} In DirecTv's case, for example, the total channel capacity for its first

^{12/} In granting HCG's and United States Satellite Broadcasting Service's ("USSB's") 1991 application for a minor modification of their DBS systems, the Commission expressly cited the "adaptability to video compression, which will result in more channels" as a public interest benefit attending the proposed modification. United States Satellite Broadcasting Company, 7 FCC Rcd 7247, 7248 (1992).

^{13/} Notice at 8 n.41.

^{14/} Report of the Senate Committee on Commerce, Science, and Transportation on S.12 (Report 102-92, June 28, 1991), at 92; Report of the House Committee on Energy and Commerce, H.R. Rep. No. 102-628, 102d Cong. 2d Sess. 124 (1992), at 124.

^{15/} Choosing a 4:1 compression ratio is not an exact science, because different programming offered throughout various dayparts will be compressed at different ratios. Nevertheless, a 4:1 compression seems a sound estimate for the Commission to choose for various reasons. First, DirecTv believes that much noncommercial programming envisioned by the statute will actually be delivered by many DBS providers utilizing a 4:1 compression ratio. Such a ratio also correlates to the one assumed in the Notice. See Notice at 8,

satellite carrying 11 licensed transponders would be equal to 44 "channels" (11 transponders X 4 channels per transponder). Subsequently, when DirecTv commences service on its second DBS satellite with an additional 16 licensed transponders, the total channel capacity in terms of the number of 24-hour per day "channels" available on its system will be roughly equal to 108 "channels" (27 transponders X 4 channels per transponder). Based on this measure, DirecTv proposes that the Commission adopt the notion of Channel Equivalents (or "CEs"). This would mean that DirecTv would have 44 CEs during single satellite operation, and gain an additional 64 CEs upon introduction into service of its second satellite, yielding a total of 108 CEs.

2. "Distributors" Need Not Be Part 25 Licensees

The Commission also asks in the Notice whether the definitional reference in the statute to a Part 25 license was intended to mean that the distributor must **hold** the license in order to come within Section 25's scope.^{16/} The Commission has tentatively rejected this reading, finding that "the most natural reading of the statutory language is that the phrase 'licensed under part 25' refers to the satellite used to distribute programming," such that Section 25 "does not appear to mandate that a distributor also be a Part 25 licensee in order to be implicated by the (b)(5) definition." Thus, the Commission concludes that the requirement for fulfilling Section 25 obligations rests with the distributor and not with the satellite licensee.

DirecTv agrees with the Commission's reading of the statute. Congress expressly used the term "licensee" as the operative mechanism for including Part 100 DBS providers under the statute. Congress did not use this approach for addressing Part 25 providers, and instead focused on

n.41. Second, while higher compression ratios, such as 8:1, will be utilized for some DBS programming, it is also contemplated that DBS providers will be offering HDTV programming, which is expected to require a full transponder for transmission. Thus, a 4:1 compression seems to be a reasonable benchmark to use in determining the capacity of a DBS provider.

^{16/} Notice at ¶ 17.

"distributors" who control a threshold number of channels on an FSS satellite. This makes sense because most capacity on Part 25 FSS satellites is sold on a "transponder sales" basis and the FSS licensee normally has little control over the use to which the capacity will be put. This is in contrast to the Part 100 licensee where, while there needs to be some flexibility, the licensee will be much more actively involved in programming decisions. Thus, the statute appears to confer expressly upon the Commission jurisdiction over program distributors for the limited purpose of enforcing compliance with Section 25's public interest requirements, once it is determined that such distributors "control" a certain minimum number of channels on any satellite.

III. PUBLIC INTEREST REQUIREMENTS UNDER SECTION 25(a)

Section 25(a) requires the Commission, at a minimum, to apply the reasonable access provisions of Section 312(a)(7) of the Communications Act, and the equal time requirements of Section 315 of the Communications Act, to DBS providers. The Commission has proposed to apply its existing broadcast rules implementing these requirements to DBS, but to modify the rules as appropriate to "account for differences between multichannel DBS systems and traditional broadcast stations."^{17/}

As an administrative matter, it makes sense for the Commission to tailor its existing political broadcasting rules to the DBS medium rather than to reinvent the wheel in view of Congress's explicit incorporation of the political broadcast statutory requirements into Section 25. Moreover, as suggested earlier, it is appropriate, and indeed, necessary from a public policy perspective, for the Commission to adapt its broadcast regulatory framework to the DBS context.

A. "Reasonable Access" Under Section 312(a)(7) of the Communications Act

Section 312(a)(7) of the Communications Act and Section 73.1944 of the Commission's rules require broadcast stations to afford reasonable access for federal candidates to

^{17/} Notice at ¶ 21.

their facilities, or to permit federal candidates to purchase "reasonable amounts of time." In considering these rules, the Commission recently clarified and codified its policies, and elected to continue its longstanding policies of deferring to the reasonable good faith judgments of broadcast licensees to provide reasonable access to federal candidates and of determining compliance on a case-by-case basis.^{18/} DirecTv agrees with the Commission's decision to similarly defer to the judgements of DBS licensees in providing reasonable access to federal candidates.

The Commission should, however, adapt the political broadcasting rules to the DBS medium. By its terms, the Section 312(a)(7) requirement of "reasonable access" is limited to federal candidates. But it is crucial for the Commission to be mindful in implementing these rules that DBS technology is inherently national in scope, and uniquely non-local in nature.^{19/} Because DBS systems will provide service to the entire continental United States, for example, allowing potentially every federal candidate to seek "reasonable" access to DBS channels makes no sense.

In implementing its public interest rules, and particularly reasonable access requirements, the Commission should continue to recognize that DBS is an inherently national service. Although the Commission is correct in observing that the current state of DBS technology does allow for addressability of the system -- according to zip codes, for example -- full implementation of such technology to accommodate service to many different individual service areas would be expensive, burdensome and a highly inefficient use of channel capacity.

Thus, given the unique aspects of DBS service, DirecTv proposes that the Commission allow DBS providers latitude similar to that of broadcasters in determining what constitutes "reasonable access," with the discretion to take into account a variety of factors. DBS

providers should be able to consider their "broader programming and business commitments," including the number of candidates in a race, the potential program disruption and the amount of time already purchased by a candidate. Furthermore, given the national scope of DBS service, "reasonable access" to DBS channels should be limited to races involving federal races of national importance.^{20/}

In addition, DBS providers should be allowed discretion in other ways to reasonably control placement of political ads in their programming. Because many DBS providers, including DirecTv, will primarily offer subscription or premium services programmed by third parties, they will have much less ability, if any, to alter daily programming schedules to make accommodations within dayparts for political broadcast time. For this reason, DBS providers should be allowed to designate one or more channels they will make available for political programming, and should not be required to provide access to every channel.

B. Equal Opportunities Under Section 315(a) of the Communications Act

Much of the discussion above with respect to reasonable access also applies to Section 315 obligations. Thus, the Commission similarly should adapt the "equal opportunity" requirement to account for the multichannel aspect of DBS. Section 315(a) currently provides that if a broadcast licensee permits any legally qualified candidate to use its station, the licensee must afford equal opportunity to all other candidates in the use of the station. In this context, DBS providers, unlike broadcasters, operate multichannel video delivery systems, somewhat akin to their cable competitors.

^{20/} This might be done by allowing DBS providers to consider, in making particular access determinations, whether a particular political race has national importance -- a factor unique to DBS but comparable to the local broadcaster's consideration of whether a race has interest to the local audience. In any event, the Commission correctly observes that, in applying the "reasonable access" provisions in the context of national networks, there is precedent for pairing nationwide access with national candidates. See Notice at ¶ 27; Carter-Mondale Presidential Committee, 74 F.C.C. 2d 624, 629 (1979). DirecTv does not propose at this time limiting races of "national importance" only to President and Vice Presidential elections, since some Senate and House races, for example, may also qualify as such. The Commission's policies in this area will probably be best served by waiting to assess the nature and magnitude of the demand by political candidates for DBS access once such systems are up and running.

As the Commission has acknowledged in the Notice, it has "never required cable systems to air opposing candidates advertisements on the same channels or to take into consideration the demographics of channels," and neither should it do so for DBS.^{21/}

C. Dedicated Political Channels

In discussing the reasonable access and equal opportunity provisions described above, the Commission raises the possibility of DBS providers being granted the "discretion to place all political advertisements on one channel or a limited number of specific channels."^{22/} The Commission should certainly grant DBS providers such discretion. DBS providers can and will attempt to accommodate Section 25(a)'s reasonable access and equal opportunity requirements by making time available on channels over which they exercise control over the programming day. But as mentioned earlier, many DBS channels will carry "advertisement free" subscription or premium services where such control is not feasible.^{23/} Given such circumstances, a dedicated political channel could be a promising method of alleviating this problem. Such a channel could be made available to all qualified federal candidates involved in races of national importance on a 24-hour/day basis, allowing ample time to meet equal opportunity obligations.

D. Lowest Unit Charge ("LUC") Under Section 315(b) of the Communications Act

The Commission also proposes to apply its broadcast LUC policies to providers of DBS video service. DirecTV agrees with the Commission's proposal on this point, but observes that many DBS providers are not likely to engage heavily in the aggressive sale of commercial advertising time on their systems, at least not on any scale that approximates such activity in the broadcast area. Hence, the applicability of the LUC concept to DBS may be attenuated. It is particularly difficult at

^{21/} See Notice at ¶ 26.

^{22/} Notice at ¶ 23.

^{23/} In certain circumstances, advertising may be permitted but subject to significant contractual restraints.



It is difficult to predict how these statutory obligations and the Commission's ultimate rules implementing them will affect the growth or quality of DBS service. Consistent with its flexible regulatory approach, the Commission should wait and see how the service develops, and determine the parameters of the demand for public interest services and DBS providers' promotion of them, before adding requirements that may be burdensome for start-up companies.

G. Localism On DBS Systems

For similar reasons, any Commission-imposed obligations based on the principle of localism do not make sense, and particularly not in the nascent phase of DBS service. The Commission must not burden service providers with additional requirements which may be costly and technically disruptive of systems under development, and which the public may not want.

In addressing the subject of localism, the Commission has asked whether a national mode of programming service such as DBS can accomplish the long standing goal of service to individual communities. While DBS will surely provide service to all communities, the satellite technology to be deployed is designed for the provision of a nonlocal service that will provide service on a national or regional basis.^{25/} The technology is neither meant nor suited for the provision of traditional local broadcast service.^{26/} In fact, DirecTv will instead be marketing its service in many cases as a nationwide complement to local broadcast and cable services. To facilitate this objective, the receiving equipment utilized by DirecTv subscribers will have a user-friendly "A/B" switch so that customers may switch from DBS satellite reception to local broadcast or cable programming.

Thus, the Commission should continue to treat DBS as an inherently national service with a mission much different than that of providing service to individual communities. The Commission is correct in its conclusion that, presently, the provision of local DBS service is not

^{25/} See Notice at ¶ 33.

^{26/} See NAB v. FCC, 740 F.2d 1190, 1197 (D.C. Cir. 1984).

economically feasible. Nor, as the Commission also suggests, does it make sense to even consider imposing such a technical and economic burden on new DBS providers, given the abundance of broadcast and cable stations that currently serves local needs.

IV. CARRIAGE OBLIGATIONS FOR NONCOMMERCIAL EDUCATIONAL OR INFORMATIONAL PROGRAMMING

Section 25(b)(1) of the Cable Act requires DBS providers to reserve 4-7% of their total channel capacity exclusively for noncommercial programming of an educational or informational nature. As a particular subset of Section 25(b)(1), Section 25(b)(3) of the Act states that DBS providers "shall meet the requirements of this subsection by making channel capacity available to national educational programming suppliers," upon reasonable prices, terms, and conditions.

A. Measuring Amount of Channel Capacity to be Reserved

Although Congress has directed DBS providers to reserve 4-7% of their total channel capacity for noncommercial programming, the statute and legislative history are largely silent as to how such amounts of channel capacity should be measured.

First, DirecTv strongly urges the Commission to adopt 4% as the maximum amount of capacity that DBS should be required to reserve for noncommercial programming, at least initially. Although the Commission may raise this figure in the future, it should at this point be extremely wary of imposing undue restrictions on DBS service development. DirecTv believes that the wisest regulatory approach at this point is to impose the minimum capacity obligation designated by the statute until more is known about how such requirements will affect the economics, evolution and complexion of the DBS industry.

Next, as the Commission acknowledges, in the absence of express guidance, capacity for purposes of assessing a DBS provider's compliance with the statute could be measured in many different ways, e.g., by specifying a number of discrete channels reserved for noncommercial use relative to total channel capacity, or by identifying a percentage of cumulative time to be set aside for

noncommercial use.^{27/} DirecTv proposes that a DBS operator be given the flexibility, based on the "Channel Equivalency" ("CE") method described above, to measure the capacity required to be provided using the cumulative time method.

At pp. 9-11 supra, DirecTv pointed out that the Commission can gain a good estimate of a DBS system's total channel capacity by first assuming a 4:1 compression ratio and multiplying it by the number of transponders to determine the total compressed "channel base" for a given system. Thus, DirecTv's total CE would be 108.

For purposes of translating that concept into a specific obligation, DirecTv suggests that the Commission multiply this number by 4%, and then convert that number into an amount of cumulative exhibition time measured in monthly increments. For DirecTv, the number would be 4% X 108 X 30 days per month X 24 hours per day. Thus, DirecTv would be required to make available 3,110 exhibition hours available per month for educational or informational programming. DirecTv would keep appropriate records of the type and duration of the programming provided.

The above approach to charting DBS providers' public interest obligations has distinct advantages. First, as mentioned, the cumulative hour approach, based upon the CE method, accounts for the presence of digital compression. It therefore provides a much more accurate and realistic determination of a DBS provider's channel capacity.

Second, the cumulative hour approach allows DBS providers to fulfill their obligations flexibly, by drawing upon noncommercial programming from appropriate dayparts spread across the spectrum of DirecTv's programming. DBS providers need not and should not be confined solely to a mechanism of dedicated channels to fulfill the Section 25 requirement, but instead should retain the flexibility either to dedicate certain channels exclusively to noncommercial programming, to aggregate

^{27/} Notice at ¶ 39.